Supreme Court, U.S.
FILED
NOV 28 2014
OFFICE OF THE CLERK

No. 14-419

IN THE

Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* ASSOCIATIONS OF CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Karen M. Gottlieb
Post Office Box 1388
Coconut Grove, FL 33233

Sonya Rudenstine
2531 NW 41st St., Suite E
Gainesville, FL 32606

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE
John T. Philipsborn
507 Polk Street, Suite 350
San Francisco, CA 94103

Courtney J. Linn
Counsel of Record
Robert Loeb
ORRICK, HERRINGTON & SUTCLIFFE LLP
400 Capitol Mall, Suite 3000
Sacramento, CA 95819
(916) 447-9200
clinn@orrick.com

FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS - MIAMI
A. Margot Moss
40 N.W. Third Street, PH1
Miami, FL 33128

Counsel for Amici Curiae

QUESTION PRESENTED

Whether the pretrial restraint of a criminal defendant's legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. BROAD PRETRIAL RESTRAINT OF UNTAINTED ASSETS DEPRIVES A CRIMINAL DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO BE REPRESENTED BY THE COUNSEL OF HIS CHOICE 4

A. As This Court Repeatedly Has Recognized, the Constitution Protects a Criminal Defendant's "Vital Interest" in Retaining Counsel of Choice 6

B. The Federal Government's Restraint of Untainted Assets Deprives Criminal Defendants of Funds Needed to Pay Counsel 9

C. The Constitution Requires That a Criminal Defendant Be Permitted to Access Untainted Funds Needed to Retain Counsel 13

TABLE OF CONTENTS
(continued)

Page

II. MEANINGFUL PROTECTION FOR A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE ACCORDS WITH CONGRESSIONAL AND JUDICIAL CONCERNS REGARDING OVERBROAD ASSET RESTRAINT AND FORFEITURE 19

A. The Eleventh Circuit's Ruling Conflicts With the Prevailing Views of Other Courts of Appeals Regarding the Restraint of Untainted Assets 19

B. The Eleventh Circuit's Decision Also Ignores Congressional Recognition That There Must Be Meaningful Limits on the Government's Authority to Seize a Criminal Defendant's Assets..... 22

CONCLUSION..... 24

TABLE OF AUTHORITIES

Page(s)

Cases

Arizona v. Fulminante,
499 U.S. 279 (1991).....8

Austin v. United States,
509 U.S. 602 (1993).....22

In re Billman,
915 F.2d 916 (4th Cir. 1990).....21

Caplin & Drysdale, Chartered v. United States,
491 U.S. 617 (1989).....*passim*

Chandler v. Fretag,
348 U.S. 3 (1954).....6

Johnson v. United States,
520 U.S. 461 (1997).....7

Kaley v. United States,
134 S. Ct. 1090 (2014).....*passim*

Powell v. Alabama,
287 U.S. 45 (1932).....6, 8

SEC v. FTC Capital Mkts., Inc.,
No. 09 Civ. 4755,
2010 U.S. Dist. LEXIS 65417
(S.D.N.Y. June 29, 2010).....20

Strickland v. Washington,
466 U.S. 668 (1984).....7

United States v. Bollin,
264 F.3d 391 (4th Cir. 2001).....11

United States v. Contorinis,
692 F.3d 136 (2d Cir. 2012).....13

United States v. Davila,
133 S. Ct. 2139 (2013).....8

United States v. Davis,
706 F.3d 1081 (9th Cir. 2013).....11, 13

United States v. DBB, Inc.,
180 F.3d 1277 (11th Cir. 1999).....10, 12

United States v. E-Gold, Ltd.,
521 F.3d 411 (D.C. Cir. 2008).....8

United States v. Erpenbeck,
682 F.3d 472 (6th Cir. 2012).....16

United States v. Farmer,
274 F.3d 800 (4th Cir. 2001).....20

United States v. Field,
62 F.3d 246 (8th Cir. 1995).....20

United States v. Floyd,
992 F.2d 498 (5th Cir. 1993).....20

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006).....*passim*

United States v. Jarvis,
499 F.3d 1196 (10th Cir. 2007).....16

United States v. Jones,
160 F.3d 641 (10th Cir. 1998).....18, 19, 20

United States v. Kaley,
579 F.3d 1246 (11th Cir. 2009).....20

United States v. Legro,
284 Fed. Appx. 143 (5th Cir. 2008) 14

United States v. McHan,
345 F.3d 262 (4th Cir. 2003).....16

United States v. Michelle's Lounge,
39 F.3d 684 (7th Cir. 1994).....20

United States v. Monsanto,
491 U.S. 600 (1989).....4, 9, 10, 15

United States v. Monsanto,
924 F.2d 1186 (2d Cir. 1991) 8, 20

United States v. Moya-Gomez,
860 F.2d 706 (7th Cir. 1988).....8

United States v. Najjar,
57 F. Supp. 2d 205 (D. Md. 1999).....17

United States v. Parrett,
530 F.3d 422 (6th Cir. 2008).....20

United States v. Puche,
350 F.3d 1137 (11th Cir. 2003).....11

United States v. Ripinsky,
20 F.3d 359 (9th Cir. 1994).....20, 21

United States v. Rutgard,
116 F.3d 1270 (9th Cir. 1997).....17

United States v. Saccoccia,
354 F.3d 9 (1st Cir. 2003).....19

United States v. Schlesinger,
396 F. Supp. 2d 267 (E.D.N.Y. 2005).....11

United States v. Stowell,
133 U.S. 1 (1890).....15

United States v. Tardon, No. 11-20470,
2014 WL 5431298 (S.D. Fla. Oct. 22,
2014).....20

Wallach v. Van Riswick,
92 U.S. 202 (1875).....22

Wheat v. United States,
486 U.S. 153 (1988).....7, 9

Constitutional Provisions

U.S. Const. Amend. V 2, 14

U.S. Const. Amend. VI.....*passim*

U.S. Const., Art. III, § 3, cl. 2 22

Statutes

18 U.S.C. § 981.....11, 17, 22

18 U.S.C. § 982 11

18 U.S.C. § 1345 ..... *passim*

18 U.S.C. § 1957 23

18 U.S.C. § 1963 23

21 U.S.C. § 853 ..... *passim*

31 U.S.C. § 5317 11

Act of Apr. 30, 1790,
ch. 9, § 24, 1 Stat. 117 22

Organized Crime Control Act of 1970,
Pub. L. No. 91-451, 84 Stat. 922 23

Other Authorities

H.R. Rep. No. 98-845 (1984) 10, 23

U.S. Attorneys' Manual 9-120.101
(added May 2010) 24

INTEREST OF *AMICI*[1]

Amici are associations of practicing criminal defense lawyers in Florida and California. The Florida Association of Criminal Defense Lawyers ("FACDL") has twenty-eight chapters throughout the state of Florida, including its Miami chapter founded in 1963. California Attorneys for Criminal Justice ("CAJC") is a non-profit corporation founded in 1972, with members across the state of California. The two statewide organizations are among the largest affiliates of the National Association of Criminal Defense Lawyers, and they have a combined membership of over 3,000 attorneys. The members of these organizations are committed to preserving fairness in the state and federal criminal justice systems and defending the rights of individuals guaranteed by the Constitution of the United States.

Amici are concerned that the decisions of the courts below in this case, if left standing, pose a grave threat to an accused's Sixth Amendment right to be represented in criminal proceedings by his counsel of choice. In light of the government's increasingly broad use of statutes permitting the restraint and forfeiture of assets unrelated to alleged criminal conduct, clients of *amici*'s members are often confronted with the issues raised in this case. Both organizations therefore have a particular inter-

---

[1] The parties have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution to the preparation or submission of this brief.

est in urging this Court to review and reverse the ruling by the Court of Appeals.

Amici have appeared in this Court as *amicus curiae* on several occasions, most recently in *Kaley v. United States* (No. 12-464), where they argued that the government's asset forfeiture practice undermines the Fifth and Sixth Amendment rights of persons charged with crimes, including the critically important right to counsel of choice that is the focus of their arguments here. They offer their collective professional experience and expertise in the present case to illustrate how the government's use of asset restraint and forfeiture imperils constitutional rights that are fundamental to the fairness and integrity of our nation's criminal justice system.

SUMMARY OF ARGUMENT

Under the Sixth Amendment to the Constitution, a criminal defendant has a right not only to be represented by counsel, but also "to choose *who* will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (emphasis added). As this Court has recognized, in light of counsel's crucial role in ensuring that a defendant receives the full protection the law affords, the right to be represented by counsel of choice is nothing less than "the root meaning of the constitutional guarantee" enshrined in the Sixth Amendment. *Id.* at 147-48.

That right is under threat. Armed with statutes authorizing the seizure or restraint of a criminal defendant's property prior to trial—including "untainted" assets not traceable to the alleged conduct—the government has the power to prevent those accused

of crime from accessing funds needed to retain counsel. In theory, the restraint and forfeiture of tainted assets in a defendant's possession is merely meant to ensure that "crime does not pay." *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014). But when paired with statutory provisions that define the financial loss stemming from alleged criminal conduct in expansive terms, the laws governing asset restraint and forfeiture enable the government effectively to deny the defendant the ability to retain counsel of choice.

Upholding a criminal defendant's constitutional right to choose who will represent him requires that courts release untainted funds—those with no nexus to the alleged offense conduct—needed to pay for counsel. In rejecting petitioner's request to have such assets released, the Eleventh Circuit misread this Court's precedents as foreclosing her constitutional claim. This Court, however, has never confronted the most pressing question presented here: Whether the pretrial restraint of *untainted* assets needed to retain counsel of choice violates the Sixth Amendment. If anything, this Court and others have made clear that the Sixth Amendment protects a defendant's right "to spend his own money" to obtain the assistance of counsel. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) (internal quotation marks omitted).

The Eleventh Circuit also ignored repeated warnings from other courts that the protection of this Sixth Amendment right demands that prosecutorial power over a criminal defendant's property be kept within reasonable limits. And while Congress has endowed the government with a number of stat-

utory tools to prevent criminals from benefitting from their "ill-gotten gains," *United States v. Monsanto*, 491 U.S. 600, 616 (1989), it too has demonstrated its understanding that the government's authority to seize property derived from criminal conduct does not trump a criminal defendant's constitutional right to choose who will represent him.

At issue in this case is the defense of a fundamental right, a distinguishing feature of this nation's constitutional protection for those facing the power of the state in a criminal proceeding. In light of the danger that the ruling by the courts below poses to a criminal defendant's right to counsel of choice, review and reversal by this Court is warranted.

ARGUMENT

I. BROAD PRETRIAL RESTRAINT OF UNTAINTED ASSETS DEPRIVES A CRIMINAL DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO BE REPRESENTED BY THE COUNSEL OF HIS CHOICE.

The government's power to restrain and ultimately forfeit a criminal defendant's financial assets is a potent one. Wielding statutes that define broadly the economic harm of various crimes, the government seeks—and often secures—judicial orders restraining assets far in excess of proceeds the defendant might have realized from the charged conduct. Then, by invoking statutory provisions that authorize the seizure of "equivalent value" or "substitute" property when tainted assets are unreachable, the government puts under lock and key any

legitimately derived assets a defendant might have in his possession.

The danger this two-fisted approach poses to a criminal defendant's right to counsel of choice is amply illustrated by the facts of this case. In response to petitioner's alleged Medicare fraud, the district court acceded to the government's demand that it freeze $45 million of her assets, an amount that represented all of the revenue her business had received from Medicare during a given period. Pet. App. 12-14. The court granted the request despite testimony from a government witness that, after legitimate expenses, petitioner had retained only a fraction of that amount. *Id.* at 14.

Because the $45 million figure represented an amount many times greater than petitioner's net worth, *id.* at 12, the district court's restraining order necessarily reached both the "proceeds and profits" derived from the alleged crime *and* assets with no connection to it—*i.e.*, "property of an equivalent value," *id.* at 6. Despite agreement between the government and petitioner that the court's order would likely restrain assets that would otherwise be available to retain counsel of choice, Pet. 12, the court rejected petitioner's argument that the Sixth Amendment required the release of funds, Pet. App. 29-33. The court apparently believed that representation by appointed counsel in petitioner's criminal proceedings would obviate any constitutional difficulties. *Id.* at 33.

In light of this Court's longstanding recognition of the importance of a defendant's right to counsel of

choice, the decision below was wrong and should be reversed.

A. As This Court Repeatedly Has Recognized, the Constitution Protects a Criminal Defendant's "Vital Interest" in Retaining Counsel of Choice.

The Sixth Amendment ensures that every criminal defendant has the right to the assistance of competent counsel in his defense. As this Court repeatedly has recognized, a crucial aspect of this right "is the right of a defendant ... to choose who will represent him." *Gonzalez-Lopez*, 548 U.S. at 144; *see also Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that ... a defendant should be afforded a fair opportunity to secure counsel of his own choice."); *Chandler v. Fretag*, 348 U.S. 3, 9 (1954) (noting "the right to be heard through [one's] own counsel").

Because the selection of a lawyer is effectively a decision about how best to preserve one's liberty in the face of the government's power to punish, a defendant has a "vital interest" in retaining counsel of his own choosing. *Kaley*, 134 S. Ct. at 1102. While in a criminal proceeding the accused retains ultimate authority in conducting his defense, in practice a lawyer necessarily assumes responsibility for making numerous decisions crucial to protecting a defendant's rights. *See Powell*, 287 U.S. at 69 ("Even the intelligent and educated layman ... requires the guiding hand of counsel at every step in the proceedings against him."). As this Court explained in *Gonzalez-Lopez*:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.

548 U.S. at 150; *see also Caplin & Drysdale*, 491 U.S. at 647 (Blackmun, J., dissenting) (noting that the initial choice of counsel is "the primary means for the defendant to establish the kind of defense he will put forward"); *Wheat v. United States*, 486 U.S. 153, 165 (1988) (Marshall, J., dissenting) ("[A] primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense.").

Accordingly, the Sixth Amendment does not simply guarantee that a criminal defendant will have *a* lawyer; it also ensures that, within reasonable limits, he can have *the* lawyer he believes will best secure his rights. In fact, the right to counsel *of choice* is more absolute than the right to competent counsel. While claims of ineffective assistance of counsel are subject to a form of harmless error analysis, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the improper deprivation of the right to counsel of choice constitutes structural error, *Gonzalez-Lopez*, 548 U.S. at 150. Such errors—which form "a very limited class," *Johnson v. United States*, 520 U.S. 461, 468 (1997)—mandate automatic reversal of any subsequent conviction because they "bear[] di-

rectly on the 'framework within which the trial proceeds,'" *Gonzalez-Lopez*, 548 U.S. at 150 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)), and "undermine the fairness of a criminal proceeding as a whole," *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013). As a result, even competent representation by substitute counsel does not cure a violation of a defendant's Sixth Amendment right to employ the lawyer he thinks is best. *See Gonzalez-Lopez*, 548 U.S. at 144-45.

Nor is the right to counsel of choice one that need only be afforded at trial. As this Court has long recognized, the "critical period" in a criminal proceeding—when the advice of counsel is most needed—is not the trial itself, but instead begins much earlier, when "thorough-going investigation and preparation [are] vitally important." *Powell*, 287 U.S. at 59-60. Or as the Seventh Circuit put it, "[t]he defendant needs the attorney *now* if the attorney is to do him any good." *United States v. Moya-Gomez*, 860 F.2d 706, 726 (7th Cir. 1988). Accordingly, while the deprivation of funds under a restraining order like the one entered in this case is ostensibly "temporary," in reality the initial denial of a defendant's constitutional right to choose his own lawyer is "'effectively a permanent one.'" *United States v. E-Gold, Ltd.*, 521 F.3d 411, 417-418 (D.C. Cir. 2008) (quoting *United States v. Monsanto*, 924 F.2d 1186, 1193 (2d Cir. 1991)).

The right to counsel of choice is not absolute, of course. *See Gonzalez-Lopez*, 548 U.S. at 144. An advocate who is not a member of the bar may not represent clients, and a defendant cannot insist on representation by an attorney he cannot afford, or

who otherwise declines. *Wheat*, 486 U.S. at 159. Attorneys with conflicts of interest also cannot represent clients who might want their services. *Id.* But these conditions aside, this Court has emphasized that the right to select counsel of one's choice is not simply an ancillary privilege to be discarded in favor of the government's interest in fighting crime. Rather, it is "the root meaning of the constitutional guarantee" enshrined in the Sixth Amendment. *Gonzalez-Lopez*, 548 U.S. at 147-48.

B. The Federal Government's Restraint of Untainted Assets Deprives Criminal Defendants of Funds Needed to Pay Counsel.

As this Court has noted, the seizure or restraint of property in a criminal defendant's possession is meant to ensure that "crime does not pay." *Kaley*, 134 S. Ct. at 1094. By depriving criminals of their "ill-gotten gains," *Monsanto*, 491 U.S. at 616, forfeitures "punish wrongdoing, deter future illegality, and lessen the economic power of criminal enterprises," *Kaley*, 134 S. Ct. at 1094 (internal quotation marks omitted). Seized assets may also be used to compensate crime victims and support law enforcement activities. *Caplin & Drysdale*, 491 U.S. at 629-30.

The government can also use *pretrial* injunctions and restraining orders to prevent a person accused of a serious crime from dissipating any alleged proceeds. *See* 18 U.S.C. § 1345(a)(2)(B) (authorizing a restraining order to prohibit any person from "withdrawing, transferring, removing, dissipating, or disposing of" property derived from criminal con-

duct); 21 U.S.C. § 853(e)(1) (empowering a court to enter a restraining order or injunction to "preserve the availability of property" subject to forfeiture); *United States v. DBB, Inc.*, 180 F.3d 1277, 1283 (11th Cir. 1999) (stating that Congress' main object in enacting § 1345 was "to enhance the government's ability to enjoin the dissipation of assets wrongfully obtained through fraud").

Freezing assets following an indictment is *not* meant to deprive a criminal defendant of his constitutional right to retain counsel. *See* H.R. Rep. No. 98-845, pt. 1, p. 19 n.1 (1984) (remarking that "[n]othing" in 21 U.S.C. § 853 "is intended to interfere with a person's Sixth Amendment right to counsel"); *cf. Monsanto*, 491 U.S. at 613 (noting that "'[t]he *sole* purpose of [§ 853's] restraining order provision ... is to ... assure the availability of the property pending disposition of the criminal case'" (emphasis added) (internal quotation marks omitted)). But when the government's seizure of legitimate property leaves those accused of crime without the means to pay for a lawyer, that is precisely what it does.

The threat to the Sixth Amendment right to counsel of choice arises when statutes that broadly define the economic harm of criminal offenses are combined with those that enable the government to restrain "untainted" assets wholly unconnected to the alleged criminal conduct. Numerous laws addressing financially-related crimes describe the loss from such conduct in expansive terms. The forfeiture statutes for money laundering-related offenses, for example, authorize the forfeiture of any property "involved in" a money laundering transaction.

18 U.S.C. §§ 981(a)(1)(A), 982(a)(1); *see also* 31 U.S.C. § 5317(c)(1)(A) (mandating forfeiture of all property "involved in" currency structuring offenses); 18 U.S.C. § 981(a)(2)(A) (specifying that the "proceeds" forfeitable to the government are "not limited to the net gain or profit realized" from the covered offenses). The statute at issue in this case, § 1345, similarly allows for the restraint of any assets "obtained as a result of" a banking or health care offense. 18 U.S.C. § 1345(a)(2).

Applied broadly, formulations like "proceeds," "involved in," and "obtained as the result of" extend the government's restraint and forfeiture power to assets far beyond any sums a defendant might have realized from the alleged offense. *See, e.g.*, *United States v. Davis*, 706 F.3d 1081, 1082-84 (9th Cir. 2013) (upholding a money laundering forfeiture award for $1.3 million in laundered funds against a defendant who received only $73,782 in commissions for his involvement); *United States v. Puche*, 350 F.3d 1137, 1153-54 (11th Cir. 2003) (upholding forfeiture order of $1.6 million of defendants' assets because it included $22,375.00 in illegally-derived funds); *United States v. Bollin*, 264 F.3d 391, 417-19 (4th Cir. 2001) (upholding $1.2 million forfeiture judgment against attorney who received only $30,000 in fees for minor role in securities fraud); *see also United States v. Schlesinger*, 396 F. Supp. 2d 267, 271-72 (E.D.N.Y. 2005) (citing additional cases).

Broad definitions of loss are only part of the Sixth Amendment problem. Under the statute at issue in this case, for example, the government's reach is not limited to assets "obtained as a result of" alleged criminal conduct. In cases where assets

traceable to the crime are unreachable or difficult to locate, § 1345 permits the government to restrain "property of equivalent value"—that is, untainted assets—belonging to the person suspected of the offense. 18 U.S.C. § 1345(a)(2)(B). By allowing the court to restrain assets of value equal to those the government has directly traced to the alleged offense, § 1345 is meant to provide the government "relief" when tainted property "is not as easily identified." *DBB, Inc.*, 180 F. 3d at 1286; *cf. also* 21 U.S.C. § 853(p) (allowing the government to seek forfeiture of untainted "substitute property" when the property derived from an alleged offense cannot be located). As a result, when illegally-obtained assets are not accessible, property derived from legitimate sources may be restrained or forfeited instead.

When used in tandem, statutes that broadly define property obtained as a result of alleged offense conduct and those that authorize the restraint of untainted "equivalent" or "substitute" assets create a formidable one-two punch. By describing the loss resulting from alleged criminal conduct in amounts far greater than the proceeds the defendant might have realized, and then invoking the "equivalent value" provision, the government can often reach *all* of a defendant's assets. The result is that the defendant is left with no means by which he can retain the counsel of his choice.

The need for meaningful checks on the government's restraint power is all the more apparent given the temptation that prosecutors face to exercise their power in ways that impair a defendant's ability to mount a full defense. Though it is assuredly both "unseemly and unjust" for the government "to beggar

those it prosecutes in order to disable their defense at trial," *Caplin & Drysdale*, 491 U.S. at 635 (Blackmun, J., dissenting), such conduct is not beyond imagining, *see Kaley*, 134 S. Ct. at 1106 (Roberts, C.J., dissenting) (noting that the government added a money laundering charge to the defendants' indictment two days after a magistrate judge declined to freeze the full asset amount originally sought). And regardless of how remote the possibility of prosecutorial abuse may be, it must be vigilantly guarded against. As this Court has acknowledged, the idea that the government has "a legitimate interest in depriving criminals of economic power ... to retain counsel of choice" is, to say the least, "somewhat unsettling." *Caplin & Drysdale*, 491 U.S. at 630.

C. The Constitution Requires That a Criminal Defendant Be Permitted to Access Untainted Funds Needed to Retain Counsel.

The government's use of its double-barreled weapon to cripple financially a criminal defendant raises serious concerns as a matter of basic fairness. *See Davis*, 706 F.3d at 1084-85 (9th Cir. 2013) (Berzon, J., concurring); *United States v. Contorinis*, 692 F.3d 136, 147-48 (2d Cir. 2012). By preventing a defendant from spending money to hire the lawyer he wants, the government also interferes with his constitutional right "to choose who will represent him." *Gonzalez-Lopez*, 548 U.S. at 144.

In light of a defendant's Sixth Amendment right "to spend his own money" in securing counsel, *Caplin & Drysdale*, 491 U.S. at 626 (internal quotation

marks omitted), when a district court restrains untainted assets prior to trial, it must—at the very least—release an amount sufficient to allow for payment of reasonable attorney's fees. The Eleventh Circuit in this case apparently disagreed, believing that petitioner's request for funds was "foreclosed" by this Court's decisions in *Kaley*, *Monsanto*, and *Caplin & Drysdale*. Pet. App. 3.

Not so. *Kaley* did not address a Sixth Amendment claim; the sole question the Court answered was whether the Fifth Amendment entitles defendants seeking to recover restrained property to an opportunity to contest a grand jury's determination that probable cause existed to believe that they committed the crimes charged. 134 S. Ct. at 1094.[2] And unlike the present case, *Kaley* did not involve pretrial restraint of untainted property; the petitioners conceded that the restrained assets were traceable to the alleged criminal conduct. *Id.* at 1096, 1097. Thus there was no opportunity for this Court to address whether pretrial restraint of "substitute" or "equivalent" property posed a Sixth Amendment problem.

---

[2] *Kaley* also did not foreclose a different Fifth Amendment challenge to the decision below. Several courts have recognized the potential constitutional difficulty of allowing the government to restrain assets with only a showing of "probable cause" to believe that the property is traceable to the offense conduct—as the trial court did here—rather than applying a more demanding burden of proof. *See United States v. Legro*, 284 Fed. Appx. 143, 145 (5th Cir. 2008) (discussing the distinction); Pet. App. 11 (citing cases).

The same applies to *Caplin & Drysdale* and *Monsanto*. In both cases there was no question that the assets subject to forfeiture or restraint were traceable to the conduct in question. *See Caplin & Drysdale*, 491 U.S. at 619-20; *Monsanto*, 491 U.S. at 602-04. Accordingly, this Court has never confronted the key question presented in this case: Whether the pretrial restraint of *untainted* assets needed to retain counsel of choice violates the Sixth Amendment.

The distinction between tainted and untainted assets is constitutionally crucial. In *Caplin & Drysdale*, this Court concluded that assets traceable to the alleged crime are forfeitable under § 853, even if needed to pay attorney's fees, because the "property" in question is not rightfully the defendant's. A bank robber, the Court explained, has no right to spend the funds he has stolen to retain an attorney, because "[t]he money, though in his possession, is not rightfully his." 491 U.S. at 626; *see also id.* ("A defendant has no Sixth Amendment right to spend *another person's money* for services rendered by an attorney ...." (emphasis added)). When the government seeks forfeiture, the Court found, it takes title to the disputed property "at the time of the criminal act," *Caplin & Drysdale*, 491 U.S. at 627; *see also United States v. Stowell*, 133 U.S. 1, 16-17 (1890) (noting that the government's right to the property" vests "immediately upon the commission of the act"), with the possibility of restitution to the rightful owners in certain circumstances, *Caplin & Drysdale*, 491 U.S. at 629-30.

But when a criminal defendant seeks to retain counsel with assets unrelated to the alleged criminal

conduct, he is spending no one's money but his own. In criminal forfeiture cases, for example, the government has no preexisting claim to legitimate property belonging to someone who simply happens to have been accused of a crime. *See United States v. Jarvis*, 499 F.3d 1196, 1205 (10th Cir. 2007) ("The government's interest in [substitute property], if any, is only a potential and speculative future interest.").

Congress recognized as much in designing 21 U.S.C. § 853, the principal drug forfeiture statute, whose procedures govern most criminal forfeiture proceedings. That statute explicitly gives the government the benefit of a "relation back" doctrine that vests title to proceeds derived from criminal conduct "upon the commission of the act." 21 U.S.C. § 853(c). By its terms, however, this relation-back provision does *not* apply to "substitute property." *Id.*; *see also United States v. Erpenbeck*, 682 F.3d 472, 477 (6th Cir. 2012) ("The relation-back clause [in § 853(c)] extends only to tainted property ...."); *Jarvis*, 499 F.3d at 1204-05 (similar). *But see United States v. McHan*, 345 F.3d 262, 272 (4th Cir. 2003) (holding that title to "substitute property" under § 853 vests in the government "at the time of the commission of the acts giving rise to the forfeiture").

Accordingly, when a court refuses to release assets not traceable to the alleged criminal conduct, it effectively prevents a defendant from using *his own money* to retain much-needed counsel. Given this Court's explicit recognition that the Sixth Amendment protects precisely this right, the restraint of untainted assets a criminal defendant needs to pay his lawyer raises significant constitu-

tional concerns. *See Caplin & Drysdale*, 491 U.S. at 626 (noting an "individual's right to spend his own money to obtain the advice and assistance of ... counsel" (internal quotation marks omitted)). Simply put, the defendant's significant interest in exercising his constitutional right to retain counsel of choice trumps the government's minimal interest in controlling assets over which it has no ownership claim under the relation back doctrine. *See United States v. Najjar*, 57 F. Supp. 2d 205, 209 (D. Md. 1999) ("[The] Defendant's Sixth Amendment right to counsel is simply more important than the Government's interest in ... Defendant's substitute property.").

The need to protect a defendant's Sixth Amendment right to use untainted funds to pay for counsel is illustrated by a hypothetical better tailored to the complex facts of this and similar cases than the bank robber example the district court relied on below. In a more accurate scenario, the defendant is not a bank robber at all; similar to the petitioner in this case, he is a doctor. Charging him with widespread Medicare fraud, the government restrains and ultimately seeks to forfeit $15 million in gross Medicare receipts, even though his practice has a host of legitimate expenses: office rent, employee salaries, and medical equipment. *See* 18 U.S.C. § 981(a)(2)(A) (specifying that forfeitable proceeds are "not limited to the net gain or profit realized from the offense"); *id.* at § 1345(a)(2) (permitting the restraint of property "obtained as a result of" a health care offense). Moreover, at trial the government is only able to prove $50,000 in fraudulent billings. *See United States v. Rutgard*, 116 F.3d 1270, 1290 (9th Cir. 1997) (recounting similar facts).

Nevertheless, the Sixth Amendment damage has already been done. Because the defendant never realized any amount close to $15 million from his allegedly fraudulent conduct, all legitimately derived assets he possesses—including the money he would have used to pay for a lawyer—are frozen, via the "equivalent value" provision in the statute. Under such circumstances, the release of funds needed to pay counsel will be the only means through which a defendant is able to exercise meaningfully his right to counsel of choice.

To be sure, like other aspects of the Sixth Amendment, the right to counsel of choice is subject to certain qualifications. *See supra* 8-9. In order to obtain release of funds to pay for counsel, a defendant will bear the burden of establishing that, under the restraints approved by the court, he has access to no other assets with which he can retain a lawyer. *See United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998). And it may additionally be appropriate for a district court to set conditions on payments to attorneys—including perhaps setting the fee structure—to ensure that such disbursements are reasonable and used for legitimate purposes. But subject to those conditions, the Sixth Amendment requires that a criminal defendant have access to legitimate assets needed to pay a lawyer of his choosing. Otherwise, a defendant's Sixth Amendment right to "be defended by the counsel he believes to be best," *Gonzalez-Lopez*, 548 U.S. at 146, will often be no right at all.

II. MEANINGFUL PROTECTION FOR A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE ACCORDS WITH CONGRESSIONAL AND JUDICIAL CONCERNS REGARDING OVERBROAD ASSET RESTRAINT AND FORFEITURE.

In rejecting petitioner's constitutional claim, the courts below ignored the fact that Congress and the federal courts alike have recognized that the government's authority to seize a criminal defendant's assets must be subject to certain checks. Underlying these concerns is the recognition that overbroad restraint and forfeiture poses a significant threat to a criminal defendant's rights under the Sixth Amendment.

A. The Eleventh Circuit's Ruling Conflicts With the Prevailing Views of Other Courts of Appeals Regarding the Restraint of Untainted Assets.

While the Eleventh Circuit in this case was tone deaf to the dangers posed by the government's authority to restrain and seize untainted assets, other courts have recognized that the forfeiture power's "very potency ... demands that it be reasonably contained within ascertainable limits." *United States v. Saccoccia*, 354 F.3d 9, 15 (1st Cir. 2003). Recognizing that a defendant's right to counsel of choice is "an essential component of the Sixth Amendment," *Jones*, 160 F.3d at 646, a number of Courts of Appeals have held that due process requires that a defendant be granted a hearing to contest the forfeitability of property the government wants to seize under 21 U.S.C. § 853. *See Jones*, 160

F.3d at 647; *Monsanto*, 924 F.2d at 1195; *United States v. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001); *United States v. Michelle's Lounge*, 39 F.3d 684, 697-98 (7th Cir. 1994); *cf. Kaley*, 134 S. Ct. at 1108 (Roberts, C.J., dissenting) (noting that at a defendant's request a district court "constitutionally *must*" reassess a grand jury finding that the property in question is traceable to the alleged crime).

As these courts have explained, judicial scrutiny of the government's forfeitability assertions is essential, as any imposition on a defendant's right to counsel at the pretrial stage threatens to "work a permanent deprivation." *Jones*, 160 F.3d at 646; *see also United States v. Kaley*, 579 F.3d 1246, 1258 (11th Cir. 2009) ("Being effectively shut out by the state from retaining the counsel of one's choice ... is a substantial source of prejudice"); *United States v. Tardon*, No. 11-20470, 2014 WL 5431298, at *12-13 (S.D. Fla. Oct. 22, 2014) (releasing funds to pay for counsel in light of Sixth Amendment concerns); *SEC v. FTC Capital Mkts., Inc.*, No. 09 Civ. 4755, 2010 U.S. Dist. LEXIS 65417, *10-25 (S.D.N.Y. June 29, 2010) (same).

The Courts of Appeals have been similarly careful when considering the pretrial seizure of assets more generally. For example, they have determined that 21 U.S.C. § 853, which authorizes the forfeiture of "substitute property" when assets derived from illegal drug activity cannot be located, does *not* allow for pretrial restraint of such property. *United States v. Parrett*, 530 F.3d 422, 430-431 (6th Cir. 2008); *United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 365 (9th Cir. 1994); *United States v. Floyd*, 992 F.2d 498,

500-502 (5th Cir. 1993). *But see In re Billman*, 915 F.2d 916 (4th Cir. 1990).

Recognizing the perils inherent in the "extensive powers" conferred by § 853's postconviction forfeiture provisions, these courts have been highly reluctant to hand prosecutors the "even greater governmental power" of pretrial restraint when the statutory text does not command such a result. *Ripinsky*, 20 F.3d at 365. Even though § 853 itself directs courts to construe its provisions "liberally" in order to "effectuate its remedial purposes," 21 U.S.C. § 853(o), courts have concluded that in light of the statute's "punitive nature" they must be "cautious" about reading the substitute property provision too broadly, *Ripinsky*, 20 F.3d at 363 n.5. Accordingly, courts have categorically refused to extend the "drastic remedy" of pretrial restraint to the untainted assets of an individual who was "merely accused of a crime, and thus is presumptively innocent." *Id.* at 365.

The import of these decisions is clear: Whether as a matter of statutory construction or constitutional principle, the "very potency" of the government's broad authority to restrain a defendant's assets prior to trial demands that such authority be subject to meaningful constraints.

B. The Eleventh Circuit's Decision Also Ignores Congressional Recognition That There Must Be Meaningful Limits on the Government's Authority to Seize a Criminal Defendant's Assets.

Concerns about the scope of the forfeiture and restraint power are not limited to the judicial branch. Under the government's theory in this case, pretrial restraint of assets that far exceed both the amount traceable to the alleged wrongdoing and a defendant's net worth is a perfectly acceptable exercise of prosecutorial authority under 18 U.S.C. § 1345, even when such seizure effectively negates the defendant's constitutional right to counsel of choice. But with one exception Congress has never authorized a blanket "estate forfeiture" of this kind. *See id.* at § 981 (a)(1)(G) (authorizing forfeiture of "all assets, foreign or domestic" of any individual, entity or organization engaged in, planning or perpetrating a federal crime of terrorism).

Indeed, such wholesale abnegation of a criminal defendant's property rights is constitutionally disfavored. Article III, § 3 of the Constitution forbids forfeiture of estate as a punishment for treason "except during the Life of the Person attainted," U.S. Const., Art. III, § 3, cl. 2, despite the fact that such forfeitures were common in England, *see Austin v. United States*, 509 U.S. 602, 611-13 (1993). The First Congress likewise abolished estate forfeitures as a punishment for felons, Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117, and subsequent legislatures followed suit, *see Wallach v. Van Riswick*, 92 U.S. 202, 208-09 (1875).

Along these lines, in the last several decades Congress has sought to ensure that the seizure of assets related to criminal behavior does not operate unjustly to deprive defendants—and others—of their property, despite the general expansion of the government's forfeiture power that followed passage of the Organized Crime Control Act of 1970, Pub. L. No. 91-451, 84 Stat. 922. For example, Congress included a provision in the RICO statute ensuring that a non-defendant third party can recover his interest in otherwise-forfeitable property acquired under a bona fide purchase for value. 18 U.S.C. § 1963(l)(6); *see also* 21 U.S.C. § 853(n) (providing a similar avenue for third parties to seek relief in narcotics cases).

Moreover, in reforming the statutory scheme governing most criminal forfeiture cases, Congress has shown special solicitude for defendants' rights to adequate legal representation. Most importantly, in drafting 21 U.S.C. § 853 Congress recognized the deleterious consequences that asset restraint can have on a defendant's representation, and expressly disclaimed any "inten[t] to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. No. 98-845, at 19, n.1 (1984). Reflecting similar concerns, shortly after enactment of 18 U.S.C. § 1957, which outlaws monetary transactions in property derived from specified unlawful activity, Congress revised the law to make clear that the term "monetary transaction" did *not* include "any transaction necessary to preserve a person's right to representation as guaranteed by the [S]ixth [A]mendment to the Constitution." 18 U.S.C. § 1957(f)(1).

The executive branch also has recognized the potential threat that asset forfeiture poses to the constitutional right to counsel. *See* U.S. Attorneys' Manual 9-120.101 (added May 2010) (stating that the forfeiture of monies paid as attorney's fees is to be conducted "with due consideration for the individual's right to counsel"). This concern is by no means misplaced. Though pretrial asset restraint can potentially aid a prosecution by impairing the accused's defense, if the defendant ultimately prevails on a Sixth Amendment claim the entire proceedings are undone, wasting the countless hours and untold dollars in government resources. *See Gonzalez-Lopez*, 548 U.S. at 152 (affirming that erroneous deprivation of a defendant's right to counsel of choice necessitates vacatur of conviction).

In short, all three branches of government appreciate that the systemic consequences of denying a criminal defendant the right to be represented by counsel of choice reach far and wide: "[F]ew things could do more to undermine the criminal justice system's integrity than to allow the Government to ... disarm its presumptively innocent opponent by depriving him of his counsel of choice ...." *Kaley*, 134 S. Ct. at 1110 (Roberts, C.J., dissenting) (citations and internal quotation marks omitted). Because the Eleventh Circuit in this case ignored these concerns, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted,

FLORIDA ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS
Karen M. Gottlieb
Post Office Box 1388
Coconut Grove, FL 33233

Sonya Rudenstine
2531 NW 41st St., Suite E
Gainesville, FL 32606

CALIFORNIA ATTORNEYS FOR
CRIMINAL JUSTICE
John T. Philipsborn
507 Polk Street, Suite 350
San Francisco, CA 94103

Courtney J. Linn
Counsel of Record
Robert Loeb
ORRICK, HERRINGTON
& SUTCLIFFE LLP
400 Capitol Mall,
Suite 3000
Sacramento, CA 95819
(916) 447-9200
clinn@orrick.com

FLORIDA ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS - MIAMI
A. Margot Moss
40 N.W. Third Street,
PH1
Miami, Florida 33128

Date: November 28, 2014